Supreme Court, U.S.
FILED

971507 MAR 12 1998

OFFICE OF THE CLERK

No. 97-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

KARRY TEEL, CARL HOLDEN,
AND WILLIAM MALONE,

*Petitioners,*

v.

RAJIV KHURANA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

*Of Counsel:*
Frank Massengale
Karen Kaler Whitfield
Massengale DeBruhl LLC
2750 Poydras Center
650 Poydras St.
New Orleans, LA 70130-6101

Jonathan D. Schiller
*(Counsel of Record)*
Thomas C. Goldstein
Boies & Schiller, LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015
(202) 237-2727
*Counsel for Petitioners*

March 12, 1998

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

67 pp

## QUESTIONS PRESENTED

1. Should this Court resolve the four-to-three split in the circuits over what (if any) act is a prerequisite to a plaintiff's standing to assert a civil RICO conspiracy claim?

2. Did the Court of Appeals err by holding, in conflict with two lines of circuit court authority, that Respondent's complaint stated a sufficient RICO claim—namely, that the corporation which employed Petitioners was a RICO enterprise distinct from Petitioners?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the District Court and Court of Appeals were:

Plaintiff Rajiv Khurana, M.D., Respondent here

Defendant Innovative Health Care Systems, Inc., not a party here

Defendant I.H.S. River Region Hospital of Vacherie, La., not a party here

Defendant Karry Teel, a Petitioner here

Defendant Carl Holden, a Petitioner here

Defendant William Malone, a Petitioner here

## TABLE OF CONTENTS

**Pages**

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF AUTHORITIES ..... v

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTES INVOLVED ..... 2

STATEMENT ..... 2

I. Respondent's Complaint ..... 3

II. The District Court's Ruling ..... 4

III. The Fifth Circuit's Ruling ..... 4

1. The person-enterprise distinction ..... 4

2. Standing to allege a RICO conspiracy under 18 U.S.C. § 1962(d) ..... 5

REASONS FOR GRANTING THE WRIT ..... 7

I. This Court Should Resolve the Four-to-Three Split in the Circuits Over What (If Any) Acts Give Rise To Standing to Allege a RICO Conspiracy ..... 7

II. The Petition for Certiorari Should Be Granted to Review Whether Respondent Has Failed to Allege a Sufficient RICO "Enterprise" Distinct From Petitioners ..... 12

1. This Court Should Grant Certiorari to Resolve the Split in the Circuits Regarding Whether a Plaintiff Under 18 U.S.C. § 1962(c) May Allege a Corporation as an

"Enterprise" and Its Officers and Employees as the Defendants ..... 13

2. This Court Should Grant Certiorari to Address the Fifth Circuit's Failure to Resolve Defendants' Motion to Dismiss Based on Respondent's Pleadings ..... 16

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*In re American Honda Motor Co.*, 941 F. Supp. 528 (D. Md. 1996) ..... 9

*Behrens v. Pelletier*, 516 U.S. 299 (1996) ..... 17

*Berkovitz v. United States*, 486 U.S. 531 (1988) ..... 17

*Board of County Comm'rs v. Liberty Group*, 965 F.2d 879 (10th Cir .), *cert. denied*, 506 U.S. 918 (1992) ..... 19

*Bowman v. Western Auto Supply*, 985 F.2d 383 (8th Cir. 1992), *cert. denied*, 508 U.S. 957 (1993) ..... 8, 9, 10, 12

*Brook-Med Imaging v. Imaging Mgmt. Assocs.*, No. 94-3442, 1995 U.S. Dist. LEXIS 1028 (D.N.J. Jan. 27, 1995) ..... 9

*Casper v. Paine Webber Group*, 787 F. Supp. 1480 (D.N.J. 1992) ..... 9

*Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) ..... 17

*Collins v. Hardyman*, 341 U.S. 651 (1951) ..... 17

*CPF Premium Funding v. Ferrarini*, No. 95-civ-4621, 1997 U.S. Dist. LEXIS 4188 (S.D.N.Y. Apr. 3, 1997) ..... 15

*Cullom v. Hibernia Natl'l Bank*, 859 F.2d 1211 (5th Cir. 1988) ..... 6

*Data Controls North v. Financial Corp. of Am.*, 688 F. Supp. 1047 (D. Md. 1988), *aff'd*, 875 F.2d 314 (4th Cir. 1989) ..... 16

*Discon v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *cert. denied*, 118 S. Ct. 49 (1997) ..... 14

*Doyle v. Hasbro, Inc.*, 103 F.3d 186 (1st Cir. 1996) ..... 18

*Entre Computer Centers v. FMG of Kansas City*, 819 F.2d 1279 (4th Cir. 1987) ..... 15

*Gagan v. American Cablevision*, 77 F.3d 951 (7th Cir. 1996) ..... 8, 9

**Page(s)**

*Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991)... 14, 18, 19, 20

*Hecht v. Commerce Clearing House*, 897 F.2d 21 (2d Cir. 1990) ..... 8

*Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) ..... 5

*Jaguar Cars v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995) ..... 13, 14, 18

*Miranda v. Ponce Fed. Bank*, 948 F.2d 41 (1st Cir. 1991)..... 8, 9, 10, 12

*Mruz v. Caring, Inc.*, No. 97-1468, 1998 U.S. Dist. LEXIS 826 (D.N.J. Jan. 28, 1998) ..... 9

*National Council on Compensation Ins. v. Hopkins*, No. 1:92-cv-082, 1995 U.S. Dist. LEXIS 21030 (E.D. Tenn. Dec. 19, 1995) ..... 9

*Nebraska Security Bank v. Dain Bosworth, Inc.*, 838 F. Supp. 1362 (D. Neb. 1993) ..... 14

*Protter v. Nathan's Famous Sys.*, 925 F. Supp. 947 (E.D.N.Y. 1996) ..... 15

*Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481 (10th Cir. 1989) ..... 18

*R.C.M. Exec. Gallery Corp. v. ROLS Capital Corp.*, No. 93-civ-8571, 1997 U.S. Dist. LEXIS 565 (S.D.N.Y. Jan. 23, 1997) ..... 15

*Reddy v. Litton Indus.*, 912 F.2d 291 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991) ..... 7, 8, 9, 10

*Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285 (3d Cir. 1996) ..... 9

*Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640 (7th Cir. 1995) ..... 15, 18

*Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994)..... 13, 14, 18

**Page(s)**

*Rothenberg v. Double D. Drug*, No. 96-8316, 1997 U.S. Dist. LEXIS 3851 (E.D. Pa. Mar. 26, 1997) ..... 9

*Salinas v. United States*, 118 S. Ct. 469 (1997) ..... 11

*Sartini v. Portofino Sun Center*, No. 96-Civ-4550, 1997 U.S. Dist. LEXIS 10161 (S.D.N.Y. July 16, 1997)..... 15

*Securitron Magnalock Corp. v. Schnabolk, Kalon Sys.*, No. 89-Civ-6731, 1994 U.S. Dist. LEXIS 8934 (S.D.N.Y. July 1, 1994), *aff'd*, 65 F.3d 256 (2d Cir.), *cert. denied*, 516 U.S. 1114 (1996) ..... 13

*Schiffels v. Kemper Fin. Servs.*, 978 F.2d 344 (7th Cir. 1992)..... 6, 8, 9

*Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992)..... 14, 15

*Shearin v. E.F. Hutton Group*, 885 F.2d 1162 (3d Cir. 1989)..... 8

*Stonelake v. Host Marriott Corp.*, No. 95-7211, 1996 U.S. Dist. LEXIS 11170 (E.D. Pa. July 31, 1996) ..... 9

*Terminate Control Corp. v. Horowitz*, 28 F.3d 1335 (2d Cir. 1994) ..... 9, 10

*In re Tucker Freight Lines*, 789 F. Supp. 884 (W.D. Mich. 1991) ..... 14

*United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) ..... 16

*United States v. Robinson*, 8 F.3d 398 (7th Cir. 1993) ..... 13

**Statutes and Rules**

18 U.S.C. § 1962 ..... *passim*

18 U.S.C. § 1964 ..... *passim*

Fed. R. Civ. P. 9(b) ..... 17

**Page(s)**

**Misc. Sources**

Donald W. Cassidy, Comment, *Turning RICO on Its Head:* Schiffels v. Kemper Financial Services, Inc. *and the Need to Limit Standing Under 1962(d) to Plaintiffs Who Allege Injuries From Racketeering Acts*, 78 MINN. L. REV. 467 (1993) ..... 9

Dana Wolff, *Legislative Reform: The Frontier of RICO Standing: Interpreting RICO's Conspiracy Provision to Realize Congress' Goal of Creating a Powerful Crime-Fighting Weapon*, 21 J. LEGIS. 147 (1995) ..... 9

No. 97-___

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

---

KARRY TEEL, CARL HOLDEN,
AND WILLIAM MALONE,

*Petitioners,*

v.

RAJIV KHURANA,

*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

---

Karry Teel, Carl Holden, and William Malone respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (Pet. App. 1a-3a) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (per Parker, J., joined by Wiener and Little, J.J.) (*id.* 4a-27a) is reported at 130 F.3d 143.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 12, 1997. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutory provisions at issue in this case are 18 U.S.C. §§ 1962 (c)–(d) and 1964(c), which are reprinted at Pet. App. 28a.

## STATEMENT

This case presents two important questions under the Racketeering Influenced and Corrupt Organizations Act ("RICO"). *First*, the circuits are divided four-to-three over the circumstances in which a civil plaintiff has standing to plead a RICO conspiracy. The majority rule, which the Fifth Circuit rejected in this case, is that the plaintiff's injury must arise from a RICO predicate act, not merely any overt act of the conspiracy. The question is of exceptional importance because it determines whether an array of state law torts, such as the wrongful discharge allegations at issue here, may be brought as treble-damage federal RICO actions.

*Second*, the circuits are divided regarding the "distinctiveness" requirement under 18 U.S.C. § 1962(c). Two circuits hold, contrary to the Fifth Circuit in this case and three other circuits, that a plaintiff may not allege that a corporation is the RICO "enterprise," while the corporation's officers and employees are distinct "persons" named as defendants, because this alignment of parties does not draw a sufficient distinction between the corporate "enterprise" and the defendants. Still other circuits hold that a court of appeals may not, contrary to the Fifth Circuit's decision here, sua sponte realign the parties to name the corporation as the enterprise.

## I. Respondent's Complaint

This a civil RICO action that revolves around allegations of Medicare and Medicaid fraud.[1] The plaintiff is Respondent Rajiv Khurana, M.D., the one-time Assistant Medical Director and Medical Director of I.H.S. River Region Hospital of Vacherie, La., Inc. ("River Region"). The two corporate defendants (both of which are now defunct) are River Region and the company that owned River Region, Innovative Health Care Systems ("Innovative"). The three individual defendants, who appear as Petitioners here, are Karry Teel and Carl Holden, who served as officers of River Region and Innovative, and William Malone, who served as River Region's Administrator.

Respondent's RICO claims allege violations of, inter alia, 18 U.S.C. § 1962(c) and the RICO conspiracy provision, 18 U.S.C. § 1962(d).[2] The statute provides in relevant part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962. Respondent asserted standing under 18 U.S.C. § 1964(c), which grants a right to sue to "[a]ny person injured in his business or property by reason of a violation of section 1962."

---

[1] Respondent originally brought this case in Louisiana state court alleging various torts. After Respondent amended his complaint to add claims under RICO, defendants removed the case to federal district court.

[2] Respondent pleaded various other claims which are not at issue in this Petition.

As is relevant here, Respondent's complaint addresses both the racketeering "enterprise" and Respondent's standing under RICO. The "enterprise" alleged is an "an association among the liable persons, defendants IHCS [Innovative], River Region Hospital, Teel, Holden and Malone," which "is a distinct entity from the two corporate and three individual defendants." (Resp. 2d Am. Pet. ¶¶ 32, 33.) The complaint continues, "The three individual defendants are perpetrators. The two corporate defendants, in the common sense, are passive instruments." (*Id.* ¶ 26(F).) Respondent alleges that the defendants violated 18 U.S.C. § 1962(c) and (d) by, inter alia, wrongfully discharging him for his refusal to participate in their fraudulent scheme. (*Id.* ¶ 24.)

## II. The District Court's Ruling

By Order, the District Court granted defendants' Motion to Dismiss for failure to state a claim. (Pet. App. 1a-3a.) According to the District Court, dismissal was required because Respondent "fail[ed] to plead a RICO enterprise which is separate and distinct from the RICO person, because all the named defendants are the same individuals and corporations identified as constituting the enterprise." (*Id.* 3a.) Alternatively, the Court held that

> any injury which Dr. Khurana allegedly suffered (*e.g.* harmful employment, wrongful discharge, injury to business/property) is a result of being terminated by Defendants, and not a result of Defendants' alleged RICO violations. Thus, without the proper "causal nexus" between the injuries allegedly suffered and the alleged RICO violations, Plaintiff has no standing to sue under RICO.

(*Id.* 2a-3a.)

## III. The Fifth Circuit's Ruling

On Respondent's appeal, the Fifth Circuit affirmed in part and reversed and remanded in part.

1. **The person-enterprise distinction.** The Court of Appeals agreed with the District Court that Respondent had

failed to allege in his complaint an enterprise sufficiently distinct from defendants: "Khurana has not alleged that defendants River Region Hospital or Innovative had any active role in the activities of its affiliated entity, employees or officers. [citation omitted]. In fact, Khurana alleged the exact opposite, terming the corporate entities 'passive instruments' in his complaint." (Pet. App. 25a.) The Court accordingly "affirm[ed] the district court as to its dismissal of these claims against the corporate entities as the distinctiveness requirement is not met in relation to these two defendants. River Region and Innovative cannot simultaneously be both the enterprise and the named defendants." (*Id.* 25a-26a.)

The Fifth Circuit nonetheless reversed and remanded in part, holding that the District Court improperly dismissed the claims against the *individual* defendants, who are the Petitioners here. According to the Court, "Section 1962(c) may impose liability on individual corporate officers and employees who conduct the corporate enterprise which employs them through a pattern of racketeering activity." (Pet. App. 26a.) Taking the view that "the association-in-fact enterprise that [Respondent] pleaded is in reality a 'stand-in,' or another name, for the corporate entity" (*id.* 24a), the Court held that the District Court was required to deny defendants' Motion to Dismiss on the theory (never advanced by Respondent either in the District Court or on appeal) that River Region and Innovative were the enterprise, while Petitioners Teel, Holden, and Malone were the defendants (*id.* 26a).

2. **Standing to allege a RICO conspiracy under 18 U.S.C. § 1962(d).** The Fifth Circuit separately reversed the District Court's holding that Respondent lacked standing to pursue his wrongful termination claim on a RICO conspiracy theory. Initially, the Fifth Circuit concluded that Respondent's allegations of wrongful termination under 18 U.S.C. § 1962(c) were properly dismissed by the District Court because those injuries were not "proximately caused by a RICO violation." (Pet. App. 8a (citing *Holmes v. Securities*

*Investor Protection Corp.*, 503 U.S. 258 (1992)).) "[A]n employee who refuses to participate in an activity that violates RICO and is constructively discharged for such refusal does not have standing to sue under § 1964(c)." (Pet. App. 11a (citing *Cullom v. Hibernia Natl'l Bank*, 859 F.2d 1211, 1212 (5th Cir. 1988)).) Because wrongful discharge is not a RICO predicate act and bears no intrinsic relationship to a predicate act, injuries suffered as a result of the discharge "lack the necessary 'causal connection' between the discharge and the predicate acts." (*Id.*)

The Fifth Circuit then addressed whether Respondent could plead the same wrongful discharge allegation as a RICO conspiracy.[3] This issue required the Fifth Circuit to choose between two competing lines of authority; some circuits hold that RICO conspiracy claims, like claims under section 1962(c), must allege injuries proximately caused by RICO predicate acts, while others hold that injuries arising from any "overt act" of the conspiracy are sufficient. (Pet. App. 19a ("There is a division of circuit authority on the question of whether § 1964(c) civil RICO standing for a § 1962(d) violation may be premised on injury proximately caused by overt acts in furtherance of the conspiracy that are not § 1961(1) predicate acts.").)

The Fifth Circuit adopted the latter line of cases:

> Like the Seventh Circuit, we refuse to place "a limitation on RICO standing that RICO itself does not impose." *See Schiffels*[ *v. Kemper Fin. Servs.*, 978 F.2d 344, 346 (7th Cir. 1992)]. Since § 1962(d) does not require that a predicate racketeering act

---

[3] Two sections of the Fifth Circuit's opinion address its holding that civil RICO conspiracy claims need arise only from overt acts. Part II.D.2 (Pet. App. 18a-21a) addresses Respondent's claim that defendants "fraudulently lured" him in to working for River Region. On that claim, the court found that Respondent had standing to sue under both section 1962(c) and section 1962(d). (Pet. App. 18a n.8.) Part II.E (Pet. App. 21a-22a) addresses Respondent's wrongful termination claim, for which the court found standing only under the conspiracy provision, section 1962(d).

> actually be committed, it follows that the action causing a § 1964(c) [the civil standing provision] claimant's injury need not be a predicate act of racketeering. A person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing.

(Pet. App. 20a.) The Court therefore concluded that, despite its holding that Respondent could not state a claim under 18 U.S.C. § 1962(c) for injuries arising from his alleged wrongful termination (*see supra*), Respondent could bring that claim as a conspiracy allegation under 18 U.S.C. § 1962(d). (*Id.* 22a.) "Khurana has presented the necessary proximate causation for standing to pursue his claim for termination injuries because the termination was an alleged overt act in furtherance of the alleged RICO conspiracy." (*Id.*)

This petition followed.

## REASONS FOR GRANTING THE WRIT

### I. This Court Should Resolve the Four-to-Three Split in the Circuits Over What (If Any) Acts Give Rise To Standing to Allege a RICO Conspiracy.

The Petition for a Writ of Certiorari should be granted to review the Fifth Circuit's holding that "[a] person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing." (Pet. App. 20a.) In the seven years since Justice White dissented from the denial of certiorari to resolve a two-to-one split in the circuits (*Reddy v. Litton Indus.*, 502 U.S. 921, 921 (1991)), the division in the circuits on this important and recurring question of federal law has widened substantially. As described by the Seventh Circuit:

> The circumstances under which a private plaintiff has standing to sue under RICO have been debated

> and resolved in conflicting ways. The *major disagreement* centers on whether a claimant can allege injury by any overt act intended to further the enterprise, or whether the claimant must allege injury from a predicate act of racketeering. A predicate act must be one of the specifically identified acts of racketeering listed in 18 U.S.C. § 1961. An overt act can be a predicate act, or any other act in furtherance of the conspiracy to violate RICO, so it encompasses a broader range of activities giving rise to standing. The First, Second, Eighth, and Ninth Circuits construe § 1962(d) narrowly, requiring a plaintiff to allege injury directly caused by a predicate act. *Miranda v. Ponce Fed. Bank.*, 948 F.2d 41 (1st Cir. 1991); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990); *Bowman v. Western Auto Supply*, 985 F.2d 383 (8th Cir. 1992), *cert. denied*, 508 U.S. 957, 124 L. Ed. 2d 674, 113 S. Ct. 2459 (1993); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990), *cert. denied*, 502 U.S. 921, 112 S. Ct. 332, 116 L. Ed. 2d 271 (1991). This circuit and the Third Circuit interpret RICO more broadly, requiring that a plaintiff only allege an overt act that furthers a RICO conspiracy, even if the overt act is not a predicate act. *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989).

*Gagan v. American Cablevision*, 77 F.3d 951, 958 (7th Cir. 1996) (emphasis added). Given the Fifth Circuit's express agreement in this case with the rule adopted by the Seventh and Third Circuits (*see* Pet. App. 19a-20a), the division in the circuits now stands at four-to-three.

No purpose is served by allowing this question, which undoubtedly will require this Court's intervention, to "percolate" any longer. The conflicting standards for liability

under 18 U.S.C. § 1962(d) have long been recognized by the courts of appeals[4] and the district courts,[5] which accordingly have struggled to resolve the issue in the absence of definitive guidance from this Court. The conflict also has been recognized in the literature.[6]

---

[4] (Pet App. 19a ("[t]here is a division of circuit authority")); *Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir. 1996) ("a majority of courts have disagreed with [the Third Circuit's ruling in] *Shearin*"); *Gagan*, 77 F.3d at 958 ("this circuit split has existed for some time"); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344 n.3 (2d Cir. 1994) ("[t]here is a division of circuit authority"); *Bowman v. Western Auto Supply* 985 F.2d 383, 387 (8th Cir. 1992) ("[w]e acknowledge the split among the circuits"), *cert. denied*, 508 U.S. 957 (1993); *Schiffels v. Kemper Fin. Servs.*, 978 F.2d 344, 348 (7th Cir. 1992) ("[t]he circuits have split"); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 n.9 (1st Cir. 1991) ("we, like other circuits, find [the Third Circuit's] reasoning to be unconvincing"); *Reddy*, 912 F.2d at 295 ("Two recent appellate court decisions have addressed this issue, and have taken opposing positions.").

[5] *Mruz v. Caring, Inc.*, No. 97-1468, 1998 U.S. Dist. LEXIS 826, at *39 (D.N.J. Jan. 28, 1998) ("The holding of *Shearin* is not without its critics, both within and without the Third Circuit."); *Rothenberg v. Double D. Drug*, No. 96-8316, 1997 U.S. Dist. LEXIS 3851, at *7 (E.D. Pa. Mar. 26, 1997) ("[w]hile Defendants' reasoning has been applied by other circuit courts, the Third Circuit interprets RICO more broadly"); *In re American Honda Motor Co.*, 941 F. Supp. 528, 550 (D. Md. 1996) ("[t]he circuits are split"); *Stonelake v. Host Marriott Corp.*, No. 95-7211, 1996 U.S. Dist. LEXIS 11170, at *20 n.4 (E.D. Pa. July 31, 1996) ("The holding of *Shearin* on this point has not met with universal acceptance."); *National Council on Compensation Ins. v. Hopkins*, No. 1:92-cv-082, 1995 U.S. Dist. LEXIS 21030, at *37 (E.D. Tenn. Dec. 19, 1995) ("[t]here is a division of authority among the federal circuit courts"; rejecting rule adopted by Fifth Circuit); *Brook-Med Imaging v. Imaging Mgmt. Assocs.*, No. 94-3442, 1995 U.S. Dist. LEXIS 1028, at *21 (D.N.J. Jan. 27, 1995) ("[t]here is a split among the circuits"); *Casper v. Paine Webber Group*, 787 F. Supp. 1480, 1498 (D.N.J. 1992) ("[t]here is a split among the circuits").

[6] *E.g.*, Donald W. Cassidy, Comment, *Turning RICO on Its Head:* Schiffels v. Kemper Financial Services, Inc. *and the Need to Limit Standing Under 1962(d) to Plaintiffs Who Allege Injuries From Racketeering Acts*, 78 MINN. L. REV. 467, 469 (1993) ("[T]he Seventh Circuit followed the approach adopted by the Third Circuit, and consciously rejected contrary decisions reached by the First, Second, Eighth, and Ninth Circuits." (footnotes omitted)); Dana Wolff, *Legislative Reform: The Frontier of RICO Standing: Interpreting RICO's Conspiracy*

Under the rule applied by the First, Second, Eighth, and Ninth Circuits, Petitioners unquestionably would prevail against Respondent's RICO conspiracy claim for damages arising from wrongful termination. The Fifth Circuit itself rejected Respondent's allegations of wrongful termination under 18 U.S.C. § 1962(c) precisely because the injury claimed by Respondent did not arise from a RICO predicate act. (Pet. App. 11a-12a.) The circuits which hold that injuries under 18 U.S.C. § 1962(d) must arise from a RICO predicate act consistently reject claims based on allegations of wrongful termination indistinguishable from those pleaded by Respondent in this case. Thus, in *Bowman v. Western Auto Supply*, the Eighth Circuit dismissed the RICO conspiracy claim of a plaintiff who alleged "that he was fired for protesting, speaking out against, and criticizing Western Auto's alleged double billing scheme." 985 F.2d at 388. In *Miranda v. Ponce Federal Bank*, the First Circuit reached the same result with respect to a plaintiff who claimed "that her discharge was in furtherance of [the charged] obstruction-of-justice scheme." 948 F.2d at 45. And, in *Reddy v. Litton Industries*, the Ninth Circuit dismissed the claims of a plaintiff who alleged "that he was wrongfully discharged from his job because he refused to participate in Litton's cover-up of illegal bribes." 912 F.2d at 293; *see also Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1346 (2d Cir. 1994) (rejecting section 1962(d) claim arising from "retaliatory actions taken against Nu-Life as a result of its refusal to yield to the attempted extortions").

The contrary rule adopted by the Fifth Circuit in this case, along with the Third and Seventh Circuits, is erroneous. 18 U.S.C. § 1964(c) grants standing to "[a]ny person injured in his business or property by reason of a violation of section

---

*Provision to Realize Congress' Goal of Creating a Powerful Crime-Fighting Weapon*, 21 J. LEGIS. 147, 147 (1995) ("Specifically, the courts are divided as to what type of act a private plaintiff must allege for standing purposes.").

1962." Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)." According to the Third, Fifth, and Seventh Circuits, "Since § 1962(d) does not require that a predicate racketeering act actually be committed, it follows that the act causing a § 1964(c) claimant's injury need not be a predicate act of racketeering. A person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing." (Pet. App. 20a.)

This reasoning contains at least two flaws. *First*, although section 1962(d) does not require a predicate racketeering act, so too "[t]here is *no requirement of some overt act* or specific act in the statute[], unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.'" *Salinas v. United States*, 118 S. Ct. 469, 476 (1997) (emphasis added).[7] Accordingly, even the Third, Fifth, and Seventh Circuits read some "act" requirement into the statute as a prerequisite to standing to raise a claim under section 1962(d);[8] those courts require merely an overt act rather than one of the predicate acts identified by Congress in the statute.

*Second*, if RICO conspiracy claims are not limited to injuries based on RICO predicate acts, plaintiffs will circumvent the restrictions on subsections (a)-(c) by pleading every RICO enterprise as a conspiracy. "[I]n most instances [the enterprise] will be conducted by more than

---

[7] This Court's decision in *Salinas* addressed the "definition of the conspiracy offense" (*id.* at 478), rather than the circuit split presented by this Petition.

[8] Under a reading of the statute limited strictly to its plain text, Petitioners would prevail. Section 1964(c) grants standing to "any person injured . . . by reason of a violation of Section 1962." The violation at issue here is Respondent's allegation that defendants "conspired" to violate 18 U.S.C. § 1962(c). But Respondent does not allege that he suffered any injury as a proximate result of defendants' literal act of "conspiring" together, *i.e.*, from defendants entering into the conspiracy; the injury alleged instead arises from the alleged overt acts of the conspirators.

one person or entity; and this in turn may make it somewhat difficult to determine just where the enterprise ends and the conspiracy begins, or, on the other hand, whether the two crimes are coincident in their factual circumstances." *Salinas*, 118 S. Ct. at 478. As the Eighth Circuit has explained in terms perfectly applicable to this case:

> A civil litigant, eager to collect treble damages under federal law (or to use the threat of those enhanced damages as bargaining leverage), rather than bringing a wrongful discharge claim in state court could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts.

*Bowman v. Western Auto Supply*, 985 F.2d at 388; *accord Miranda v. Ponce Fed. Bank*, 948 F.2d at 48 ("For judges, under a conspiracy rubric, to allow RICO damages for an injury caused other than by an enumerated predicate offense would be tantamount to rewriting the statute.").

## II. The Petition for Certiorari Should Be Granted to Review Whether Respondent Has Failed to Allege a Sufficient RICO "Enterprise" Distinct From Petitioners.

Although the Fifth Circuit agreed with the District Court that Respondent's complaint fails to allege an "enterprise" distinct from the defendants, it reversed in part the dismissal of the case. The complaint alleges an "association in fact" of the five named defendants. The Court of Appeals recognized both (1) that under section 1962(c) a plaintiff must identify an "enterprise" distinct from the "persons" named as defendants, and (2) that the enterprise identified by Respondent is, in reality, nothing more than a "stand in" for the corporate defendants. The Fifth Circuit nonetheless held that the District Court, rather than dismissing the case, should have rearranged the parties to name the corporations – River Region and Innovative – as the enterprise, leaving the corporations' officers and employees – Petitioners here – as

defendants. This ruling implicates two distinct splits in the circuits.

### 1. This Court Should Grant Certiorari to Resolve the Split in the Circuits Regarding Whether a Plaintiff Under 18 U.S.C. § 1962(c) May Allege a Corporation as an "Enterprise" and Its Officers and Employees as the Defendants.

The Fifth Circuit held in this case that "[s]ection 1962(c) may impose liability on individual corporate officers and employees who conduct the corporate enterprise which employs them through a pattern of racketeering activity." (Pet. App. 26a.) The Court's holding addresses the "distinctiveness" requirement under section 1962(c), *i.e.*, the extent to which the alleged RICO "enterprise" must be distinct from the "persons" named as defendants. "[T]he plain language of § 1962(c) clearly envisions separate entities, and the distinctness requirement comports with legislative intent and policy." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994). Accordingly, "Every Court of Appeals, except for the Eleventh Circuit, has interpreted 18 U.S.C. § 1962(c) to require that the 'person' and the 'enterprise' be separate and distinct entities." *Securitron Magnalock Corp. v. Schnabolk, Kalon Sys.*, No. 89-Civ-6731, 1994 U.S. Dist. LEXIS 8934, at *6 (S.D.N.Y. July 1, 1994), *aff'd*, 65 F.3d 256 (2d Cir.), *cert. denied*, 516 U.S. 1114 (1996).

Although nearly every circuit has adopted the distinctiveness requirement under section 1962(c), the circuits are divided on the scope of that requirement in the corporate context. In this case, the Fifth Circuit held that a RICO plaintiff may name a corporation as the enterprise and the corporation's officers and employees as the defendants even if the officers and employees acted within the scope of their employment. (Pet. App. 26a.) In support of its ruling, the Fifth Circuit cited decisions of the Third, Seventh, and Ninth Circuits that squarely agree. (*Id.* (citing *Jaguar Cars v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 266-69 (3d Cir. 1995); *United States v. Robinson*, 8 F.3d 398, 407 (7th Cir.

1993); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992)).) Thus, in *Jaguar Cars*, the Third Circuit overturned its earlier ruling in *Glessner v. Kenny* (952 F.2d 702 (3d Cir. 1991)) and concluded that "when officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity, those defendant persons are properly liable under § 1962(c)." 46 F.3d at 269.

The Second and Fourth Circuits, however, as well as various district courts,[9] have expressly rejected the rule adopted in this case and endorsed by the Third, Seventh, and Ninth Circuits. These courts hold that a corporation is not sufficiently distinct from the employees through which it operates. Thus, in *Discon v. NYNEX Corp.* (93 F.3d 1055 (2d Cir. 1996), *cert. denied on distinct issue*, 118 S. Ct. 49 (1997)), the Second Circuit dismissed a section 1962(c) claim in which three NYNEX corporations were named as defendants and also alleged to constitute an association-in-fact enterprise. The court relied extensively on its ruling in *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.* (30 F.3d 339) that "the activities of two loan officers 'acting within the scope of their authority' could not subject them to RICO liability for conducting the affairs of the alleged enterprise-bank." 93 F.3d at 1063. The court explained that "in *Riverwoods*, the individual defendants were acting on behalf of the enterprise-corporation, and therefore, it would have been especially inappropriate to hold that they were 'distinct' from the enterprise." *Id.* at 1064; *see also id.* ("*Riverwoods* expressly applies to 'agents' as well as 'employees' so long as those persons act on behalf of the corporation.").

Subsequent to *NYNEX* and *Riverwoods*, district courts in the Second Circuit consistently have rejected claims indistinguishable from the one endorsed here by the Fifth

---

[9] *See, e.g., Nebraska Security Bank v. Dain Bosworth, Inc.*, 838 F. Supp. 1362, 1368 n.10 (D. Neb. 1993); *In re Tucker Freight Lines*, 789 F. Supp. 884, 893-94 (W.D. Mich. 1991).

Circuit. In *CPF Premium Funding v. Ferrarini* (No. 95-civ-4621, 1997 U.S. Dist. LEXIS 4188 (S.D.N.Y. Apr. 3, 1997)), the court dismissed a section 1962(c) claim in which the plaintiff identified a corporation as the enterprise and named a subsidiary and three employees as defendants. The Court recognized that the plaintiff's claim was permissible under "[t]he position adopted [by the Third Circuit] in *Jaguar Cars* [which] is also the law in a number of other circuits." *Id.* at *36 (citing *Richmond v. Nationwide Cassel L.P.* (7th Cir.), *supra*, and *Sever v. Alaska Pulp Corp.* (9th Cir.), *supra*). But the court held that the claim nonetheless was "simply not consistent with" the Second Circuit's subsequent holding in *Discon, supra*:

> *Discon* leaves little room for doubt: when an individual defendant has acted in a corporation's behalf, he does not function as an entity distinct from that corporation, and should not be held liable under § 1962(c). In short, the *Discon* Court appears to have embraced the principles adopted by the Third Circuit in *Glessner*, and subsequently discarded in *Jaguar Cars*.

*Id.* at *38; *see also, e.g., Sartini v. Portofino Sun Center*, No. 96-Civ-4550, 1997 U.S. Dist. LEXIS 10161, at *8 (S.D.N.Y. July 16, 1997); *R.C.M. Exec. Gallery Corp. v. ROLS Capital Corp.*, No. 93-civ-8571, 1997 U.S. Dist. LEXIS 565, at *25 (S.D.N.Y. Jan. 23, 1997); *Protter v. Nathan's Famous Systems*, 925 F. Supp. 947, 955 (E.D.N.Y. 1996) ("The Court finds that the fraudulent activity alleged falls squarely within the Second Circuit's *Riverwoods* analysis, namely that the employees of the defendant corporation allegedly associated together in the course of their employment and on behalf of the corporation.").

The Fourth Circuit agrees with the Second Circuit. In *Entre Computer Centers v. FMG of Kansas City* (819 F.2d 1279 (4th Cir. 1987)), the plaintiff alleged a variety of theories under section 1962(c), including that "the individual officers and directors of Entre were the 'persons' who conducted the affairs of Entre, the 'enterprise.'" The court

held that this theory failed to allege a distinct "enterprise" and "person" because the phrase "enterprise" "'refer[s] to a being different from, not the same as or part of, the person whose behavior the act was designated to . . . . punish.'" *Id.* at 1287 (quoting *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983)); *see also Data Controls North v. Financial Corp. of Am.*, 688 F. Supp. 1047, 1052 (D. Md. 1988) (citing *Entre Computers* to hold that "[i]ndividual directors and officers of a company cannot be 'persons' while the company is deemed the 'enterprise' for purposes of establishing the requisite elements of a RICO charge"), *aff'd*, 875 F.2d 314 (4th Cir. 1989).

This split in the circuits presents an important and recurring issue meriting this Court's attention. The federal courts' contrary views (including the Eleventh Circuit's refusal to adopt any distinctiveness requirement whatsoever) expose corporations and their employees to widely divergent liability under RICO. In the Second and Fourth Circuits, plaintiffs pleading a pattern of racketeering under section 1962(c) must identify an "enterprise" distinct from the corporation – a hurdle that frequently results in dismissal. *See supra* (listing recent district court cases from the Second Circuit). By contrast, in the Third, Fifth, Seventh, and Ninth Circuits, plaintiffs are free to identify any corporation as a RICO enterprise while pursuing claims against the corporation's officers and employees for acts undertaken in the course of their employment.

**2. This Court Should Grant Certiorari to Address the Fifth Circuit's Failure to Resolve Defendants' Motion to Dismiss Based on Respondent's Pleadings.**

Certiorari also is warranted because the Fifth Circuit's attempt to rearrange the parties adopts a theory of the case never pleaded or even suggested by Respondent. Respondent's Second Amended Petition expressly identifies

the "enterprise" not as a corporation but an "association in fact" "among the liable persons, defendants IHCS [Innovative], River Region Hospital, Teel, Holden, and Malone." (Resp. 2d Am. Pet. ¶ 32; *see also* Pl. Response to RICO Standing Order ¶ 13(a) ("The enterprise includes defendants IHCS, River Region Hospital, Teel, Holden and Malone.").) Respondent specifically alleges that the enterprise is "a *distinct entity* from the two corporate and three individual defendants." (*Id.* ¶ 32 (emphasis added).) Respondent continued to maintain this position in his briefs in the District Court and on appeal: "In the instant case, the enterprise alleged is an association in fact of the five RICO defendant 'persons.' . . . Clearly each of the five defendants is 'a legal entity distinct from' the association in fact enterprise . . . ." (Pl. Opp. at 17; Appellant's Br. at 35.)

The Fifth Circuit erred in reconstituting the alleged RICO enterprise in this case because it went beyond Respondent's pleadings in reviewing the District Court's ruling on defendants' Motion to Dismiss. When a court "adjudicate[s] a motion to dismiss, [it] accept[s] all of the factual allegations in [the] complaint as true and ask[s] whether, in these circumstances, dismissal of the complaint was appropriate." *Berkovitz v. United States*, 486 U.S. 531, 540 (1988). As Justice Jackson recognized in writing for the Court nearly fifty years ago, "A motion to dismiss the amended complaint raises the issue of its sufficiency . . . ." *Collins v. Hardyman*, 341 U.S. 651, 652 (1951). Thus, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (emphasis added).[10]

---

[10] The plaintiff's pleadings take on even greater importance in a RICO action such as this one, given Fed. R. Civ. P. 9(b)'s heightened pleading standards for fraud claims. *See Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) ("Every circuit which has examined this issue has found that Rule 9(b) is applicable to RICO predicate acts based on fraud.").

Based on this bedrock principle of civil procedure, the First, Second, Third, and Seventh Circuits have ordered dismissal of the complaint in precisely this circumstance. In *Doyle v. Hasbro, Inc.* (103 F.3d 186 (1st Cir. 1996)), the district court dismissed the complaint for failure to allege an enterprise distinct from the corporate defendant – Hasbro – and its employees. On appeal, the First Circuit affirmed, "declin[ing] to rewrite the complaint language in order to find that plaintiffs sufficiently identified Hasbro as a RICO enterprise when plaintiffs do not even suggest as much on appeal." *Id.* at 191. "The complaint's failure to identify any enterprise, distinct from a named person defendant, is fatal under RICO." *Id.* The plaintiff's complaint was similarly dismissed in *Richmond v. Nationwide Cassel L.P.* (52 F.3d 640 (7th Cir. 1995)), where the Seventh Circuit rejected the plaintiff's "attempts, in her appellate briefs, to elaborate on the relationship between the 'enterprise' Nationwide Group [an association in fact] and the 'persons' Nationwide Acceptance and Cassel; the *pleading itself* must state the essential elements of the RICO action or it is *worthy of dismissal*." *Id.* at 646 (emphasis added); *see also Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d at 343 (complaint's failure to allege enterprise distinct from corporation and officers requires dismissal); *cf. Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (10th Cir. 1989) (rejecting plaintiff's effort to characterize enterprise as corporation and its employees, because "[t]he distinct entities that represent the 'person' and the 'enterprise' must be described in the pleadings").

In *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991), the district court dismissed the complaint for the same defect in pleading. On appeal, the Third Circuit "[a]ssum[ed] that there could be a viable section 1962(c) claim in which Meenan [the corporation] could be regarded as the victim enterprise," but it refused to reverse on that basis because "it is not the RICO claim alleged." [11] *Id.* at 713. The court

---

[11] This aspect of the court's holding was not disturbed by the Third Circuit's subsequent decision in *Jaguar Cars, supra.*

explained the importance of holding RICO plaintiffs to their pleadings:

> We are concerned about the alacrity with which plaintiffs appear to grasp at any theory of alignment of parties which might withstand dismissal. A RICO complaint *is not a mix and match game* in which plaintiffs may artfully invoke magic words to avoid dismissal. Instead, to plead a claim under section 1962(c) the complaint must be capable of being read to satisfy the statutory requirement that persons were conducting a pattern of racketeering through a separate and distinct enterprise. That requirement does not do violence to the notion of notice pleading. It simply reinforces the renewed emphasis on the obligation of responsible pleading. *See* Fed. R. Civ. P. 11 Advisory Committee Notes on 1983 Amendment.

*Id.* at 714 (emphasis added).

Petitioners acknowledge that the Fifth Circuit's realignment of the parties in this case is supported by a decision of the Tenth Circuit. *See Board of County Comm'rs v. Liberty Group*, 965 F.2d 879 (10th Cir .), *cert. denied*, 506 U.S. 918 (1992). In *Liberty Group*, the plaintiff prevailed at trial on a RICO claim that rested on an "association in fact" enterprise encompassed by a corporation, three related businesses, and two employees. *Id.* at 885. On appeal, the Tenth Circuit held that this alleged enterprise was, in reality, not distinct from the corporation, and it reversed the judgment against the corporation. *Id.* The court nonetheless *affirmed* the judgment against an employee named as a defendant on the ground that "he may be a 'person' under 1962(c). Thus the defect in proving the existence of a 'person' separate from the 'enterprise' is not present with respect to [him], and a new trial for such defect is not present." *Id.* at 886.

The Fifth and Tenth Circuits' failure to hold RICO plaintiffs to their pleadings – in conflict with the First, Second, Third, and Seventh Circuits – is an important issue

meriting this Court's review. The Fifth Circuit reversed and reinstated the complaint against Petitioners in this case, holding that a district court is obligated *as a matter of law* to maintain a plaintiff's action if the court can sua sponte identify a sufficient RICO enterprise, notwithstanding that the plaintiff's pleadings openly and clearly specify a wholly different theory of the case. (Pet. App. 26a.) Not only will plaintiffs therefore engage in a "mix and match game" (*Glessner*, 952 F.2d at 714) in naming "enterprises" and "persons," but defendants will be forced to endure, as here, years of litigation as the courts struggle to replead complaints for plaintiffs in order to allow RICO cases to go forward.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

— Respectfully submitted,

*Of Counsel:*
Frank Massengale
Karen Kaler Whitfield
Massengale DeBruhl LLC
2750 Poydras Center
650 Poydras St.
New Orleans, LA 70130-6101

Jonathan D. Schiller
*(Counsel of Record)*
Thomas C. Goldstein
Boies & Schiller, LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015
(202) 237-2727
*Counsel for Petitioners*

Dated: March 12, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

---

CIVIL ACTION
No. 95-1217

---

SECTION "D" (1)

---

RAJIV KHURANA

v.

INNOVATIVE HEALTH CARE SYSTEMS, INC., ET AL

---

Before the court is the Motion to Dismiss Rico Claims filed by Defendants, Innovative Health Care Systems, Inc., Kerry Teel, Carl Holden, William Malone, and IHS River Region Hospital of Vacherie, La., Inc. Plaintiff, Rajiv Khurana, M.D., filed a memorandum in opposition. The motion, set for hearing on Wednesday, December 20, 1995, is before the court on briefs without oral argument.

In this matter, Plaintiff sues Defendants alleging wrongful termination from his position as Medical Director of River Region Hospital and violations of the RICO statute, 18 U.S.C. § 1962(b), (c) and (d). In his Second Amended Petition, Plaintiff states:

> 24) Alleged as victim is the plaintiff Dr. Rajiv Khurana who was injured by defendants' use of him as a necessary but unknowing part of their illegal activities. Beginning in or about October 1994 plaintiff was injured by defendants' repeated attempts to bribe, witness tamper and extort him, which acts were of the type regularly used by defendants as part of a pattern of racketeering activity . . . After these

> repeated attempts against plaintiff failed and, as a result of his December 30, 1994 suspension of the admission to the Hospital of ineligible patients for whose charges reimbursement was illegally sought and paid from Medicaid funds, . . .on or about January 10, 1995 plaintiff was wrongfully discharged by defendants from his position as Medical Director at River Region Hospital which constituted further witness tampering and extortion of him. . .

(*See* Second Amended Petition, Para. 24E). The RICO claims are premised on Dr. Khurana's allegations that Defendants committed Medicaid and Medicare fraud in their hospital's billing practices. (*See* Second Amended Petition, Doc. No. 11, Paras. 22A(i); B(i); C(i); D(i); and E(i).

Having considered the memoranda of counsel and the applicable law, the court finds that Defendants' motion seeking dismissal of Plaintiff's RICO claims has merit and should be granted because

> (1) Plaintiffs who are discharged for refusing to participate in or "blowing the whistle" on alleged racketeering activities lack standing to sue under 18 U.S.C. § 1964(c).[1] *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1216 (5th Cir, 1988).[2] Here, any injury

---

[1] "Essentially, § 1964(c) requires that a plaintiff's injury must be "by reason of" a violation of § 1962 of RICO." *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1212 (5th Cir. 1988).

[2] Other Circuits are in accord with the Fifth Circuit on this issue. *See e.g., Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987); *Burdick v. American Express Co.*, 865 F.2d 527 (2nd Cir. 1989); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2nd Cir. 1990); *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987); *Bowman v. Western Auto Supply Cop.*, 985 F.2d 383 (8th Cir. 1993); *Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151 (6th Cir. 1990).

which Dr. Khurana allegedly suffered (*e.g.* harmful employment, wrongful discharge, injury to business/property) is a result of being terminated by Defendants, and not a result of Defendants' alleged RICO violations. Thus, without the proper "casual nexus" between the injuries allegedly suffered and the alleged RICO violations, Plaintiff has no standing to sue under RICO. *Id.*;

(2) Plaintiff fails to plead a RICO enterprise which is separate and distinct from the RICO person, because all the named defendants are the same individuals and corporations identified as constituting the enterprise. Thus, Plaintiff's claims under 18 U.S.C. § 1962(c) must be dismissed. *Crowe v. Henry*, 43 F.3d 198, 205-06 (5th Cir. 1995); *In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993). Similarly, Plaintiff's claims under 18 U.S.C. § 1962(d) must be dismissed to the extent that the conspiracy alleged violates § 1962(c).

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss RICO Claims be and is hereby GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 96-30525

---

RAJIV KHURANA,

Plaintiff-Appellant,

v.

INNOVATIVE HEALTH CARE SYSTEMS, INC.; KARRY TEEL; CARL HOLDEN; WILLIAM MALONE; I.H.S. RIVER REGION HOSPITAL OF VACHERIE, LA., INC.,

Defendants-Appellees.

December 12, 1997, Decided

SUBSEQUENT HISTORY: As Revised January 26, 1998.

DISPOSITION: REVERSED in part and AFFIRMED in part.

JUDGES: Before WIENER, PARKER, Circuit Judges, and LITTLE,* Chief District Judge.

OPINION: PARKER, Circuit Judge:

Dr. Rajiv Khurana appeals the district court's dismissal of his complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the basis that he did not have standing to bring his civil claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO")

---

* Chief Judge of the Western District of Louisiana, sitting by designation.

and alternatively, because Khurana failed to plead a RICO enterprise separate and distinct from the defendant in some of his civil claims based on 18 U.S.C. § 1962(c). Finding that Khurana may have standing for some of his civil RICO claims, we affirm in part and reverse and remand in part.

## FACTS AND PROCEEDINGS BELOW

For purposes of this appeal, we accept the following factual allegations as true.

Dr. Rajiv Khurana ("Khurana") filed suit in Louisiana state court against the defendant-appellees, alleging defamation and wrongful discharge from his position as Medical Director of River Region Hospital in Vacherie, Louisiana,[1] as well as civil claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), U.S.C. § 1961 *et seq.*, based on violations of 18 U.S.C. § 1962(b), (c), and (d).[2] Khurana's civil RICO claims arise from a

---

[1] Khurana's state law claims were remanded to state court following the district court's Fed. R. Civ P. 12(b)(6) dismissal of his RICO claims. Only issues related to the dismissal of Khurana's RICO claims are before the panel.

[2] 18 U.S.C. § 1962(b)-(d) is as follows:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate of foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Medicare and Medicaid fraud scheme in which the appellees were engaged.

River Region Hospital ("River Region" or "hospital") is an owned subsidiary of Innovative Health Care Systems, Inc. ("Innovative"). Both River Region and Innovative are defendant-appellees in this action. Defendant-appellees also include Karry Teel and Carl Holden, who hold offices in both Innovative and River Region, and William Malone, River Region's administrator.

Khurana is a practicing physician with dual specialities in psychiatry and neurology. In July 1993, Khurana was hired to be River Region's Assistant Medical Director under a three-year contract. Khurana agreed to join River Region as its Assistant Medical Director on the basis of fraudulent misrepresentations as to the legitimacy of the hospital's operations and qualifications. In June of 1994, Khurana was named the hospital's Medical Director. After his promotion, he became aware that the hospital was engaging in fraudulent Medicaid and Medicare practices. He was discharged from his position as Medical Director six months later in January of 1995. The hospital went out of business in 1996.

After the appellees removed the suit to federal court, Khurana filed an amended complaint alleging that the appellees committed a variety of RICO predicate acts (wire and mail fraud, extortion, bribery, witness tampering, and violation of the Travel Act, 18 U.S.C. § 1952) and that these acts constituted a pattern of racketeering activity in violation of § 1962(b) and § 1962(c). Khurana also alleged a conspiracy, in violation of 18 U.S.C. § 1962(d), to violate 18 U.S.C. § 1962(b) and § 1962(c). In his complaint, Khurana contended (1) that he was fraudulently induced into "harmful employment associations" which caused him a loss of legitimate business opportunity and damage to his professional reputation, (2) that he was wrongfully discharged which caused him a loss in earnings, benefits and reputation, and (3) that the appellees' "illegal competition" with him in

his private and hospital practices caused him a loss in business income.

The appellees filed a motion to dismiss Khurana's RICO claims pursuant to Fed. R. Civ. P. 12(b)(6). The appellees argued to the district court that (1) Khurana did not have standing to assert the RICO claims, and that (2) Khurana failed to allege a RICO "enterprise" separate and distinct from a RICO "person," *i.e.*, a perpetrator, associated with or employed by the enterprise as required for claims based on 18 U.S.C. § 1962(c). The district court granted the motion and Khurana now presents this panel with the same two issues in his appeal.

## DISCUSSION

### I. Standard of Review

We review the dismissal of a complaint for a failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6) *de novo*. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). A claim may not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992). For purposes of our review, we must accept the plaintiff's factual allegations as true and view them in a light most favorable to the plaintiff. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995).

### II. § 1964(c) RICO Standing

The appellant argues that the district court erred in dismissing the RICO claims because proper causation between his injuries and RICO violations was pleaded, giving him standing. The appellees collapse the appellant's injuries into one mass of discharge complaints and contend that Khurana cannot have standing for any of his claims because he was not the target of any Medicaid/Medicare fraud scheme. We disagree that Khurana's alleged injuries may be viewed as

a homogeneous group. We consider the injuries individually because Khurana's standing for each turns on a proximate causation inquiry.

A. Overview of § 1964(c) Standing

Section 1964(c) provides that

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). In order to establish standing under § 1964(c), a plaintiff must show (1) a violation of § 1962, (2) an injury to his business or property, *and* (3) that his injury was proximately caused by a RICO violation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1214 (5th Cir. 1988). Khurana challenges the district court determination that his injuries were not proximately caused by RICO violations.

When the Supreme Court announced the proximate cause prerequisite to § 1964(c) standing in *Holmes*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532, it directed us to "the many shapes this concept took at common law." *Id.* at 268.

> [w]e use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984).

*Id.* at 268. In *Holmes*, the Court held that an alleged stock manipulation scheme that disabled two broker-dealers from meeting obligations to customers did not proximately cause

the claimed injury of a plaintiff-corporation subrogated to the rights of the broker-dealers' non-purchasing customers. Such was too remote an injury to satisfy the proximate cause requirement because only an intervening insolvency connected the RICO conspirators' acts to the customers' injuries. *Id.* at 271. Taking guidance from the common law's enunciation of proximate causation, the Court reasoned that those injured only "indirectly" by racketeering activity do not have § 1964(c) standing.[3] *Id.* at 268, 274. Allowing for recovery for the *Holmes*' secondary victims would run afoul of proximate causation standards. *Id.* at 274. In her concurrence, Justice O'Connor explained that the "words 'by reason of' [in § 1964(c)] operate . . . to confine RICO's civil remedies to those whom the defendant has truly injured in some meaningful sense."[4] *Id.* at 279. The proximate cause requirement is intended to preclude recovery by plaintiffs who "complain[] of harm flowing merely from the misfortunes visited upon a third person." *Id.* at 268.

In *Holmes*, the Court acknowledged that articulating a definition of "proximate cause" for purposes of § 1964(c) standing analysis was difficult:[5] "the infinite variety of claims that may arise make it virtually impossible to announce a

---

[3] The Court noted that in using such a term, it did "not necessarily use it in the same sense as courts before us have." *Holmes*, 503 U.S. at 274 n.20.

[4] To repeat, 18 U.S.C. § 1964(c) is as follows:

> Any person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fees.

(emphasis added).

[5] In fact, it is generally true that an articulation of the meaning of "proximate cause" is a "fruitless quest for a universal formula." *Prosser & Keeton on Torts* § 42, p. 279. "The search for some test or formula which will serve as a universal solvent for all of the problems of 'proximate cause' has occupied many writers." *Id.* at 276.

black-letter rule that will dictate the result in every case. Thus, our use of the term 'direct' should be merely understood as a reference to the proximate cause enquiry that is informed by the concerns set out in the text." 503 U.S. at 274 n.20.[6] These concerns have been cited as the demands of justice, a reluctance to open the flood gates to administratively inconvenient and unmanageable litigation, *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs.*, 985 F.2d 102, 104 (2d Cir. 1993) (citing *Holmes*, 112 S. Ct. at 1316 n.10, 1318), the potential for duplicative recoveries and superfluous deterrence, *In re Am. Express Co. Shareholder Litig.*, 39 F.3d 395, 401 (2d Cir. 1994), and the statutory goal of encouraging directly injured victims to act as private attorneys general to vindicate the law, *Mendelovitz v. Vosicky*, 40 F.3d 182, 185 (7th Cir. 1994); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 (8th Cir. 1993). Given that factual causation (i.e., "cause-in-fact" or "but-for" causation) is now clearly insufficient to confer § 1964(c) standing, *see, e.g., Standardbred*, 985 F.2d at 104, we are left with the common law of proximate causation in making civil RICO standing determinations. "[T]he holding of *Holmes* is no more than that common law ideas about proximate causation inform the understanding of RICO." *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995), *cert. denied*, __*U.S.*__, 116 S. Ct. 1847, 134 L. Ed. 2d 948 (1996). The pertinent inquiry in determining the existence of proximate, or "legal," cause is "whether the conduct has been so significant and important a cause that the defendant should be held responsible." *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331,

---

[6] In his concurrence, Justice Scalia offered a thought in the same vein.

> The degree of proximate causality required to recover damages caused by predicate acts of sports bribery, for example, will be quite different from the degree required for damages caused by predicate acts of transporting stolen property.

503 U.S. at 288 (Scalia, J., concurring) (statutory citations omitted).

336 (4th Cir. 1996) (quoting *Prosser & Keeton on Torts* § 42, p. 272 (5th ed. 1984)). The proximate cause determination for RICO standing is guided by indications of preconceived purpose, specifically intended consequence, necessary or natural result, reasonable foreseeability of result, the intervention of independent causes, whether the defendant's acts are a substantial factor in the sequence of responsible causation, and the factual directness of the causal connection. *See, e.g., Chisholm*, 95 F.3d at 338; *In re Am. Express*, 39 F.3d at 400; *Standardbred*, 985 F.2d at 104.

B. Termination as a Result of a § 1962(b) or § 1962(c) Violation

Khurana claimed that he was discharged from his position as Medical Director of River Region Hospital because he refused to participate in and attempted to stop the appellees' RICO activities and that his discharge was an act in furtherance of the appellees' fraud scheme. Those claims are foreclosed for a § 1962(b) or § 1962(c) violation. In *Cullom v. Hibernia Nat'l Bank*,[7] we held that an employee who refuses to participate in an activity that violates RICO and is constructively discharged for such a refusal does not have standing to sue under § 1964(c). 859 F.2d 1211, 1212 (5th Cir. 1988). We found that such a situation lacked the necessary "causal connection" between the discharge and the predicate acts. *Id.* at 1216 (discussing and relying on RICO "whistle blower" cases and citing *Sedima* [*S.P.R.L. v. Imrex Co., Inc.*], 473 U.S. 479, 105 S. Ct. 3275 [1985], 87 L. Ed. 2d 346. In order to have standing, Khurana's injury, here his discharge, must "flow from the commission of the predicate acts." *Id.* (quoting *Sedima*, 473 U.S. at 497). In our proximate causation discussion in *Cullom*, we explained that "Cullom's injury resulted from SNB's decision to fire him after he refused to participate in the alleged scheme . . . Neither

---

[7] While *Cullom* predated *Holmes*, like *Holmes*, it imposed a proximate causation requirement for § 1964(c) standing. Thus, *Holmes* did not disturb the our [*sic*]holding in *Cullom*.

Cullom's injury nor SNB's decision to fire Cullom resulted from the alleged predicate acts." *Id.* at 1216.

Just as in *Cullom*, Khurana pleaded predicate acts for the alleged violations which did not proximately cause his termination. Accordingly, Khurana lacks standing to bring a civil claim asserting termination injuries resulting from a § 1962(b) or § 1962(c) violation.

C. Loss of Business Income as a Result of "Illegal Competition" with Khurana's Hospital and Private Practices

We confront the same standing questions with respect to Khurana's standing to bring his civil RICO claim for "illegal competition:" was there (1) an alleged injury to property or business (2) proximately caused by (3) a RICO violation? *See Holmes*, 503 U.S. at 258; *Cullom*, 859 F.2d at 1214.

Khurana alleges that the defendants illegally competed with his post-termination medical practice. The defendants treated psychiatric patients for which they illegally obtained Medicaid and Medicare reimbursement, thus depleting the available number of reimbursable patients in the region, some of whom might otherwise have been treated by Khurana and other area hospitals at which he practiced.

Khurana's loss of business income is too remote to satisfy the proximate causation requirement. *See Holmes*, 503 U.S. at 267, 272 ("direct-injury limitation [is] among the requirements of § 1964(c)"). Khurana's injury does not "flow," *Sedima*, 473 U.S. at 497, from either the conspiracy to engage in a pattern of racketeering activity or from any engagement in a pattern of racketeering activity. There are intervening factors between the defendants' fraudulently obtaining Medicaid and Medicare reimbursement and Khurana's loss of business income, *e.g.*, a significant reduction of the available pool of patients in that market, patients' choices of physicians, Khurana's ability to accommodate additional patients, and exhaustion of state-

allocated funds. Justice Scalia offered an apt observation in his concurrence in *Holmes*.

> Life is too short to pursue every human act to its remote consequences; "for want of a nail, a kingdom was lost" is a commentary on fate, not the statement of a major cause of action against a blacksmith.

503 U.S. at 287. The necessary contributing factors to this injury to Khurana make it clear that such an injury was not proximatley caused by the defendants. *See, e.g., Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924 (9th Cir. 1994) (finding proximate cause lacking because plaintiff subleased office space from another entity and direct harm ran to the master tenant since plaintiff's harm was contingent on the master tenant's decision to pass the rent increase through to the subletter-plaintiff); *Imagineering Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1312 (9th Cir. 1992) (finding no "direct relationship" between defendants' conduit scheme and plaintiffs' failure to earn certain profits on subcontracts because intervening inability of prime contractors to secure the contracts was direct cause of plaintiffs' injuries); *Firestone v. Galbreath*, 976 F.2d 279, 284, 285 (6th Cir. 1992) (finding only indirect injury where grandchildren alleged that defendants stole from grandmother during her lifetime, thus decreasing the size of her estate and their inheritance); *cf., e.g., Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993) (finding proximate cause where bribery of council member could have caused rejection of developer's development proposal). In addition, Khurana was a distanced victim of any "illegal competition;" the state and federal government were more directly injured. *See Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 289 (3d Cir. 1996) (noting that Medicare and Medicaid programs and taxpayers are victims of Medicaid/Medicare fraud). As such, the risk of multiple recoveries indicates an absence of proximate cause in the same fashion in which it is absent in the case of

shareholders' RICO claims that are derivative of a corporation. *See Holmes*, 503 U.S. at 273; *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993) (finding no "direct relation" because shareholder's injury is generally derivative of injury to corporation and thus not directly related to defendant's injurious conduct). Khurana thus lacks § 1964(c) standing for all of his RICO claims premised on any injuries from "illegal competition."

D. Loss of Opportunity and Damage to Professional Reputation as a Result of "Fraudulent Hiring"

Khurana's set of RICO claims based on injuries resulting from being hired at River Region must be examined under the same proximate causation requirement.

1) Loss of Business Opportunities and Damage to Professional Reputation as a Result of Substantive RICO Violations

The injuries pleaded by Khurana are denigration to his professional reputation via the "harmful employment associations" that resulted from being "fraudulently lured" into his position at the hospital and the loss of foregone legitimate employment opportunities. In *Sedima*, the Court held that the injury relied on by a plaintiff must be the result of a § 1962 violation. 473 U.S. at 496. The Court explained that for standing based on a § 1962(b) or § 1962(c) violation, a valid RICO injury must necessarily stem from predicate acts that underpin the § 1962 violation. *Id.* at 497. The necessary racketeering activities are those activities catalogued in § 1961(1). *Id.* at 495. Khurana contends that the defendants caused him injury by fraudulently inducing him to accept employment via mail and wire fraud, thereby damaging his reputation through association with their fraudulent activities and depriving him of other legitimate business opportunities.

a. Professional Reputation Damage

Khurana pleaded injury proximately resulting from the defendants' violations of § 1962(b) and § 1962(c) when he asserted the injury of business reputation harm. For § 1962(b) and § 1962(c) violations, the injurious conduct must be racketeering acts as listed in § 1961(1). According to Khurana's pleadings, he detrimentally relied on the appellees' misrepresentations as to the legitimacy of the hospital's operations in taking his position with the hospital. Such reliance on a predicate fraud act can indicate the necessary proximate relationship between the injury asserted and the injurious conduct. *See Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) (citing cases); *Standardbred*, 985 F.2d at 104. In *Standardbred*, the defendants acquired a race track financed by municipal bonds. In the application for the bonds, the defendants stated an intent to operate the race track and assured the plaintiffs of such as well. The defendants subsequently stopped racing. The Second Circuit held that the plaintiffs had § 1964(c) standing because in the fraudulently induced belief that the racing would continue, they purchased, relocated and reconstructed capital equipment for use at the track and designed their purchases and training of horses with the intent to race them at the track. Khurana similarly relocated himself and his medical practice to this hospital, a significant financial and professional decision, allegedly as a result of the appellees' misrepresentations as to the legitimacy of the hospital's operations.

In addition, the damage to Khurana's professional reputation was a foreseeable result of the various racketeering acts of wire and mail fraud. *See* discussion *supra* Part II.C. Khurana, as the hospital's director, was essentially the figurehead of a fraud-ridden, now defunct institution. The act of fraudulently hiring him can be a proximate cause of any damage that his professional reputation has suffered. Damage to his professional reputation is easily seen as a natural outgrowth of such an employment association. As the predicate acts were pleaded as responsible for Khurana's

acceptance of his employment with River Region, we find that the pleadings presented the claim of necessary proximate cause for Khurana's standing for this claim. *See Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (finding proximate cause where defendants' conduct was substantially responsible for claimed injuries); *see also generally Prosser & Keeton on Torts* § 41, p. 268 (discussing substantial responsibility and proximate cause).

b. Legitimate Employment Opportunity

Regarding Khurana's claimed loss of legitimate business opportunity, we begin our consideration by noting that RICO civil standing is not limited to only the immediate victim of a defendant's RICO violation. *See Zervas v. Faulkner*, 861 F.2d 823, 823, 833 (5th Cir. 1988) ("A requirement that the nexus between the injury and a predicate act be 'direct' may . . . be overly restrictive."); *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) (rejecting adoption of a rule that only injuries suffered by the immediate victim of a predicate act satisfy the "by reason of" requirement of § 1964(c)). In *Mid Atlantic*, a plaintiff telephone company accused one of its competitors of violating RICO by defrauding its customers with fictitious charges, enabling it to charge lower rates to entice new subscribers. The plaintiff company alleged that it lost revenues from subscribers who were defrauded into accepting the fraudulent lower rates of the defendant company. The Fourth Circuit rejected the argument that the plaintiff company lacked standing because the customers were the directly injured parties and only they were proximately injured by its alleged misconduct. Similarly, Khurana may not have been the intended target of the fraud scheme, but like the telephone company in *Mid Atlantic*, he pleaded the loss of a legitimate business opportunity resulting from the defendants' alleged racketeering acts. *Holmes* did not preclude a RICO claim for "indirect" injuries, but rather instructed the federal courts to employ common law proximate causation principles. *See Israel Travel*, 61 F.3d at

1257. Some indirect RICO injuries, such as this one, satisfy the proximate causation requirements of common law. *Id.* In fact, we have previously rejected a direct versus indirect injury test as the dispositive standing inquiry for civil RICO claims. *See Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 746 (5th Cir. 1989); *see also Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989) (avoiding using direct versus indirect terminology to make standing determinations and instead focusing on causation); *Prosser & Keeton on Torts* § 42, p. 273-74 (discussing direct versus indirect as only one of several theories of proximate causation).

In *Mid Atlantic*, the Fourth Circuit noted that the plaintiff was not seeking to vindicate the claims of its competitor's customers, but rather its own alleged distinct and independent injuries of lost customers and lost revenues. 18 F.3d at 264. We agree with the Fourth Circuit that distinct and independent injuries are in keeping with the Supreme Court's understanding of proximate cause in *Holmes*. Khurana pleads his own injury of loss of legitimate employment opportunity. In *Holmes*, an intervening event, the insolvency of the securities brokership, broke the causal link between the plaintiff's injury and the defendant's conduct, 503 U.S. at 262, 264, so that the plaintiff was a "secondary victim." *Id.* at 274. In contrast, the plaintiff in this case seeks to recover for losses substantially attributable to the defendants' conduct.

Finally, as explained before, the fact that Khurana pleaded reliance on the defendants' racketeering acts as a cause of this injury indicates a valid claim that the racketeering acts proximately caused him to forego other legitimate business opportunities. *See Chisholm*, 95 F.3d at 337; *Standardbred*, 985 F.2d 102. Khurana claims that he was fraudulently induced to take his position with the hospital and argues that such proximately caused him to lose other legitimate business opportunities. As Khurana's loss of other employment opportunities was foreseeable by the defendants and could certainly be anticipated as a natural consequence of

their alleged misrepresentations, Khurana has sufficiently pleaded that the alleged substantive violations of § 1962(b) and § 1962(c) proximately caused his business opportunity loss. *See Chisholm*, 95 F.3d at 337 (relying on plaintiff's detrimental reliance on defendants' material misrepresentations to find proximate cause and noting that "in order for the scheme to succeed, the appellants needed to be convinced that the 'private sales' referenced in the TransSouth notices were legitimate . . . . concealment of the nature of the 'private sales' was the very linchpin of the scheme."); *cf. Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1170 (3d Cir. 1989) (affirming the dismissal of a RICO claim based on a "loss" of the plaintiff's former job where there was no allegation that the employer reneged or the plaintiff was "duped out of her old job").

2. Standing for a § 1962(d)-based Civil RICO Claim for Loss of Business Opportunity and Damage to Professional Reputation as a Result of Hiring

Khurana pleaded that the defendants conspired to commit RICO violations, and in doing so, injured his professional reputation and caused him a loss of legitimate business opportunity. In *Cullom*, we held that a "retaliatory" discharge lacks sufficient causation for § 1964(c) standing for a substantive RICO violation. However, *Cullom* was limited to a causation inquiry and did not address standing for a RICO civil claim premised on conspiracy acts, *i.e.*, acts in furtherance of a conspiracy to commit a pattern of racketeering, a violation of § 1962(d).[8]

---

[8] In this section we consider civil standing for a § 1962(d) violation. Based on our previous discussion in Part II.D.1., we also recognize that Khurana pleaded proximate cause for § 1962(d) violations causing reputation damage and business opportunity loss where the § 1962(d) violations are predicated upon the racketeering acts of wire and mail fraud already discussed. Accordingly, we also reverse the district court's dismissal of Khurana's claims on that basis, subject to our discussion in

There is a division of circuit authority on the question of whether § 1964(c) civil RICO standing for a § 1962(d) violation may be premised on injury proximately caused by overt acts in furtherance of the conspiracy that are not § 1961(1) predicate acts. *See Reddy v. Litton Indus., Inc.*, 502 U.S. 921, 921, 112 S. Ct. 332, 332, 116 L. Ed. 2d 272 (1991) (White, J., dissenting from denial of certiorari and noting circuit split); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 386 (8th Cir. 1993) (collecting cases). The Third and Seventh Circuits have held that the injurious acts for § 1964(c) standing for a claim based on a § 1962(d) violation may be racketeering acts as listed in § 1961(1) *as well as* overt acts in furtherance of the conspiracy. *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir. 1992) (adopting reasoning of *Shearin*); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989); *see also Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 958-59 (7th Cir. 1996) (reviewing circuit split and following Schiffels); *Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 & n.6 (3rd Cir. 1996) (noting circuit split and applying *Shearin*). In contrast, for example, the Second Circuit has held that because a conspiracy, an agreement to commit predicate acts, cannot by itself cause any injury and because RICO's purpose is to target RICO activities and not other conduct, standing may be founded *only* upon injury from overt acts that are also § 1961 predicate acts, and not upon overt acts furthering a RICO conspiracy. *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344-45 (2d Cir. 1994).

Section 1962(d) provides that "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." It is well-established that we must follow a plain meaning statutory interpretation unless a statutory provision presents an ambiguity or an inconsistency with a statute's legislative purposes. *United States v. Ron Pair Enters., Inc.*, 489 U.S.

---

Part III in which we affirm the dismissal of some of Khurana's claims as to the corporate defendants.

235, 242, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989). Like the Seventh Circuit, we refuse to place "a limitation on RICO standing that RICO itself does not impose." *Schiffels, 978 F.2d at 346*. Since § 1962(d) does not require that a predicate racketeering act actually be committed, it follows that the act causing a § 1964(c) claimant's injury need not be a predicate act of racketeering. A person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing. *See Id. at 349*. To interpret otherwise would ignore § 1964(c)'s provision for civil liability for, *inter alia*, a violation of § 1962(d) that proximately injures a person's property or business. Buttressing this position is the Supreme Court's and Congress's direction that "RICO is to be read broadly" and "'liberally construed to effectuate its remedial purpose.'" *Sedima*, 473 U.S. at 497-98 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947).

In addition, while the Second Circuit noted that RICO was designed to combat substantive violations, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990), the provision for conspiracy violations was part and parcel of Congress's intent and plan and cannot be ignored. *See Sedima*, 473 U.S. at 499 (noting that although RICO used in ways not originally envisioned, Congress and not the courts must amend statute).

Having determined that Khurana's standing is not precluded by the necessity of causative racketeering acts, we must consider whether his pleading sufficiently alleges proximate causation for § 1964(c) standing premised on an underlying § 1962(d) violation.

In *Shearin*, the Third Circuit held that the plaintiff's hiring as window dressing and firing to preserve the fraud both qualified as *conspiracy acts* for a § 1962(d)-based civil claim.

> Shearin's hiring and firing plausibly constitute overt acts that not only would establish a conspiracy, but in this case were allegedly essential to it. Assuming

> that the hiring and firing were injuries, those injuries did occur "by reason of" Hutton's violation of section 1962(d).

885 F.2d at 1168-69. Similar facts are presented here. Hiring Khurana allegedly allowed the defendants to pose as a medical facility qualifying for federal funds, which allowed them to fraudulently obtain Medicare and Medicaid reimbursement. As in *Shearin*, it appears that the hiring of Khurana was an overt act critical to the conspiracy. As the hiring of Khurana was an alleged predicate conspiracy act, any lost opportunity for legitimate employment and damage to professional reputation "flowed" from RICO predicate acts, *see Cullom*, 859 F.2d at 1215, and Khurana has pleaded the necessary proximate cause for his claim of hiring injuries based on a § 1962(d) violation. Khurana thus has cleared, from a pleading standpoint, the proximate cause hurdle for standing for these claims.

E. Standing for a § 1962(d)-based Civil Claim for Termination Injuries

We explained earlier that Khurana does not have standing under § 1964(c) to pursue a § 1962(b) or § 1962(c) claim for termination injuries. However, he may have § 1964(c) standing to pursue a claim for termination injuries as a result of an act in furtherance of a conspiracy. RICO racketeering acts as well as acts in furtherance of a RICO conspiracy may provide standing to sue for civil conspiracy claims if they are the proximate cause of an injury.

Khurana alleged that he was discharged from his position as Medical Director in furtherance of the appellees' scheme of Medicaid fraud. "The discharge was intended to remove Plaintiff from continuing to have access to information about defendants and to intimidate him to hinder and prevent his testimony as a witness in future proceeding," "to eliminate his access to information concerning the defendants' illegal activities" and was an act "to maintain control of and conduct" the enterprise. In addition, and probably most

importantly, Khurana alleges that terminating him had the effect of rescinding Khurana's order of ten days previous in which Khurana suspended the admission to the hospital of illegal Medicaid patients. Khurana alleges that he was terminated so that the defendants could "continu[e] their illegal procurement of Medicaid and Medicare funds and minimiz[e] impediments thereto." As such, Khurana has presented the necessary proximate causation for standing to pursue his claim for termination injuries because the termination was an alleged overt act in furtherance of the alleged RICO conspiracy. Such an allegation presents sufficient causation to confer standing. *See Rehkop*, 95 F.3d at 290-91 (holding that the plaintiff's termination constituted an overt act in furtherance of an alleged conspiracy and thus the plaintiff had RICO standing); *Schiffels*, 978 F.2d at 350-51 (holding that a plaintiff-employee may have RICO standing when he alleges that he was fired in an attempt to prevent him from causing the conspiracy to unravel by disclosing scheme); *Shearin*, 885 F.2d at 1170 (holding that allegation that plaintiff was fired in furtherance of a conspiracy in violation of § 1962(d) stated a claim for relief under § 1964(c)); *Williams v. Hall*, 683 F. Supp. 639, 642 (E.D. Ky. 1988) (finding civil RICO standing for discharged employee for alleged § 1962(d) violation where the plaintiff alleged that part of conspiracy was to cover up illegalities by terminating employees refusing to participate in schemes).

### III. The Enterprise-Person Distinction for a § 1962(c) Violation

Khurana also contends that the district court erred in dismissing his claims under 18 U.S.C. § 1962(c) and § 1962(d) (to the extent involving a conspiracy to violate § 1962(c)) for failure to plead a RICO enterprise which is separate and distinct from the RICO person referenced in § 1962(c).

We must consider this contention in relation to Khurana's remaining § 1962(c) claims. The remaining § 1962(d) claims must also be considered in relation to this

issue to the extent that they are based on a conspiracy to commit a § 1962(c) violation. *Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993). Section 1962(c) provides that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The statutory definition of enterprise includes "any individual, partnership, corporation, association, or other alleged legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Khurana alleged that the enterprise is an association-in-fact of all five defendants (the three individuals and the two corporate entities).

The district court dismissed Khurana's claims that were bottomed on § 1962(c) on the alternative basis (from the dismissal on the basis of standing) that Khurana failed to plead a RICO defendant that was distinct from the enterprise in his § 1962(c)-premised claim and his claim based on a conspiracy to commit a § 1962(c) violation in violation of § 1962(d).

For purposes of a claim based on § 1962(c), RICO persons associated with or employed by an enterprise must be distinct from the RICO "enterprise." *Crowe v. Henry*, 43 F.3d 198, 205-06 (5th Cir. 1995). Section 1962(c) imposes liability on an employee or associate of an enterprise conducting affairs of the enterprise through a pattern of racketeering activity and, logically, such an individual cannot employ or associate with itself. *See, e.g., Ashe*, 992 F.2d at 544. Accordingly, some of Khurana's claims that are based on 18 U.S.C. § 1962(c) fail because his pleadings do not contain a sufficient distinction between the persons who allegedly committed the unlawful acts and the enterprise with which they are employed or associated.

Khurana has failed to plead a corporate defendant distinct from the enterprise in that the association-in-fact enterprise that he pleaded is in reality a "stand-in," or another name, for the corporate entity. *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994). By alleging as a RICO enterprise a group consisting solely of a bank and several of its employees, the plaintiffs in *Riverwoods Chappaqua* effectively identified the RICO enterprise as the corporate defendant. The distinctiveness requirement may not be avoided

> by alleging a RICO enterprise that consists merely of a corporation defendant associated with its own employees or agents carrying on the regular affairs of the defendants . . . . Where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.

*Id.* While it is theoretically possible for a corporation to play a separate active role in RICO violations committed by its employees and agents, *see Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995), *cert. denied*, 516 U.S. 1114, 116 S. Ct. 916, 133 L. Ed. 2d 846 (1996); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 302 (3d Cir. 1991); *Petro-Tech, Inc. v. Western Co. of No. Am.*, 824 F.2d 1349, 1361 (3d Cir. 1987), when the alleged association-in-fact entity is in reality no different from the association of individuals or entities that constitute a defendant "person" and carry out its activities, the distinctiveness requirement is not met in regard to that defendant. *See Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580, 583-84 & n.3 (5th Cir. 1992) (finding an association-in-fact of employees of corporation to be the defendant corporate entity functioning through its employees in the course of their employment); *Glessner v. Kenny*, 952 F.2d 702, 712 (3d Cir. 1991); *Brittingham*, 943 F.2d at 302 ("Without allegations or

evidence that the defendant corporation had a role in the racketeering activity that was distinct from the undertaking of those acting on its behalf, the distinctiveness requirement is not satisfied."). Khurana has not alleged that defendants River Region Hospital or Innovative had any active role in the activities of its affiliated entity, employees or officers. *See Glessner*, 952 F.2d at 712 & n.10. In fact, Khurana alleged the exact opposite, terming the corporate entities "passive instruments" in his complaint.

In addition, the distinctiveness requirement is not satisfied by pleading a subsidiary corporation or affiliated entity as a perpetrator-defendant if the parent corporation and the subsidiary's roles in the alleged racketeering activities are not sufficiently distinct. *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-64 (2d Cir. 1996) (distinctiveness requirement not satisfied where three corporate defendants that constituted alleged enterprise, although legally separate, "operated within a unified corporate structure" and were "guided by a single corporate consciousness"), *cert. denied*, __U.S.__, 118 S. Ct. 49, 139 L. Ed. 2d 14 (1997); *Compagnie De Reassurance D'Ile de France v. New England Reins. Corp.*, 57 F.3d 56 (1st Cir. 1995); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir. 1993) ("A RICO claim under § 1962(c) is not stated where the subsidiary merely acts on behalf of, or to the benefit of, its parent."); *Chamberlain Mfg. Corp. v. Maremont Corp.*, 919 F. Supp. 1150, 1154-58 (N.D. Ill. 1996) (holding that where enterprise was an association-in-fact of the parent corporation and its subsidiary, it lacked its own distinct legal identity for purposes of § 1962(c)). In this case, Khurana did not plead any distinct roles for the subsidiary River Region and the parent corporation Innovative so that they might be regarded as having any distinctiveness from the alleged enterprise. "We would not take seriously . . . an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon." *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982). As the association-in-fact pleaded by Khurana is in reality the corporate entity, we must affirm

the district court as to its dismissal of these claims against the corporate entities as the distinctiveness requirement is not met in relation to these two defendants. River Region and Innovative cannot simultaneously be both the enterprise and the named defendants. *See Securitron*, 65 F.3d at 263. Therefore, we conclude that Khurana's attempt to circumvent the distinction requirement in regard to the corporate defendants by pleading an association-in-fact theory must be rejected.

We must also consider the claims in relation to the other named defendants, the officers and employees of the two corporate entities. *See, e.g. Banks v. Wolk*, 918 F.2d 418, 424 (3d Cir. 1990) (leaving RICO action intact against certain individual defendants while dismissing the corporate defendant for failure to withstand distinctiveness requirement); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1411 (3d Cir. 1991) (considering § 1962(c) claim separately for each defendant's fulfillment of distinctiveness and other requirements). As we explained above, Khurana's complaint essentially pleads the corporation as the enterprise. Section 1962(c) may impose liability on individual corporate officers and employees who conduct the corporate enterprise which employs them through a pattern of racketeering activity. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 266-269 (3d Cir. 1995); *United States v. Robinson*, 8 F.3d 398, 407 (7th Cir. 1993); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989); *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985); *see also Securitron*, 65 F.3d at 263. Accordingly, we reverse the dismissal of the remaining § 1962(c)-related claims against the three individual defendants.

## CONCLUSION

For the foregoing reasons, we REVERSE in part and AFFIRM in part. We affirm the district court's dismissal of Khurana's claims based on alleged violations of § 1962(c) and § 1962(d) (to the extent they allege conspiracy to violate

§ 1962(c)) against the two corporate defendants. We also affirm the district court's dismissal of all claims alleging injury from "illegal competition." Additionally, we affirm the district court's dismissal of Khurana's claims alleging termination injuries as a result of § 1962(b) and § 1962(c) violations. We reverse the district court's dismissal of all other claims with directions to reinstate them for further proceedings consistent with this opinion.[9]

---

[9] Our reversal of the dismissal of these claims is not meant to express any opinion as to other issues related to these claims which the district court may address on remand. Given that the parties did not brief any other issues to the district court and that only the appellant briefed the properness of his pleadings of RICO violations, we have concerned ourselves only with the district court's legal conclusions supporting its dismissal of Khurana's RICO claims, namely the issues of proximate causation for his standing and the necessary distinctiveness for the § 1962(c)-related claims. We leave any other issues or challenges for the district court's consideration in the first instance. *See Youmans v. Simon*, 791 F.2d 341, 348 (5th Cir. 1986) (declining to consider challenges to the particularity with which mail and wire fraud allegations were pleaded in a RICO claim, preferring to remand to district court because the district court did not consider such challenges); *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220, 1222 (11th Cir. 1983) (refusing to decide at interlocutory appeal stage theories for dismissing RICO claims that were not decided by district court, preferring to remand theories for district court to address in first instance).

## RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 1962(c)

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d)

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964(c)

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

MOTION FILED
AUG 4 1998

(2)

No. 97-1507

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

---

KARRY TEEL, CARL HOLDEN,
AND WILLIAM MALONE,

*Petitioners,*

v.

RAJIV KHURANA,

*Respondent.*

---

**PETITIONERS' MOTION TO VACATE AND FOR DOUBLE COSTS UNDER RULE 44.7**

---

*Of Counsel*:
Frank Massengale
Karen Kaier Whitfield
Massengale DeBruhl LLC
2750 Poydras Center
650 Poydras St.
New Orleans, LA 70130-6101

Jonathan D. Schiller
(*Counsel of Record*)
Thomas C. Goldstein
Boies & Schiller, LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, D.C. 20015
(202) 237-2727
*Counsel for Petitioners*

August 4, 1998

8 pp

No. 97-1507

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

---

KARRY TEEL, CARL HOLDEN,
AND WILLIAM MALONE,

*Petitioners,*

v.

RAJIV KHURANA,

*Respondent.*

---

**PETITIONERS' MOTION TO VACATE AND FOR DOUBLE COSTS UNDER RULE 44.7**

---

1. Petitioners respectfully move this Court for an Order vacating the judgment of the United States Court of Appeals for the Fifth Circuit and remanding with instructions to dismiss the case as moot. See United States v. Munsingwear Corp., 340 U.S. 36 (1950). See generally STERN & GRESSMAN, SUPREME COURT PRACTICE § 18.5 (7th ed. 1993). Respondent initially waived his right to respond to the Petition for a Writ of Certiorari. When the Court called for a response (see App. 1), Respondent failed to comply. Instead, Respondent requested that Claimants agree voluntarily to arbitrate their dispute. Only when Claimants declined did Respondent decide to withdraw the federal claims from his Complaint and remand his state law claims to state court rather than defend the decision of the court of appeals. Respondent's initial motion to dismiss without prejudice was

denied. Respondent then moved to dismiss with prejudice, and the District Court granted the motion on July 16, 1998. (App. 2.) As such, the issues raised by the Petition are entirely moot.

2. This case satisfies the criteria for vacatur. The judgment below, if left in place, would expose Petitioners to assertions of collateral estoppel and res judicata in the imminent state court proceedings or any subsequent federal court proceedings brought by other parties. Moreover, Respondent's decision to abandon his federal claims was made unilaterally and was not conditioned in any way upon the disposition of the Petition in this Court or the disposition of the judgment of the court of appeals. Finally, the Petition presents substantial questions that have divided the courts of appeals.

Under this Court's precedents:

> When a civil case becomes moot pending appellate adjudication, "[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). Vacatur "clears the path for future relitigation" by eliminating a judgment the loser was stopped from opposing on direct review. Id. at 40. Vacatur is in order when mootness occurs through happenstance–circumstances not attributable to the parties–or, relevant here, the "unilateral action of the party who prevailed in the lower court." U.S. Bancorp Mortgage Co. [v. Bonner Mall Partnership, 513 U.S. 18,] 23 [(1994)]; cf. id., at 29 ("motness by reason of

> settlement [ordinarily] does not justify vacatur of a judgment under review").

Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1071 (1997) (alterations in Arizonans for Official English).

3. This case also presents "extraordinary circumstances" entitling Petitioners to an award of double costs under Rule 44.7. In point of fact, only $300 is at stake – i.e., under Rule 44.3, Petitioners would receive double the fee they paid to file the Petition for Certiorari – and that amount would cover only a small portion of the approximately $1000 cost of printing the Petition. But the principle involved is important. Respondent put Petitioners to the cost of litigating this issue not only in the district court, but also in the Fifth Circuit, and then before this Court through the filing of a Petition for a Writ of Certiorari. Even then, Respondent did not withdraw his claims but instead sought refuge in the possibility that the Court would not call for a response and would deny certiorari. When the Court did call for a response – expressly directing Respondent that "[f]orty printed copies of your response, together with proof of service thereof, should be filed on or before May 11, 1998" (App. 1) – Respondent simply decided not to comply.

Respondent's counsel subsequently informed Petitioners that Respondent intended to withdraw his federal claims. After consulting with the Clerk's office, counsel for Petitioners requested that Respondent's counsel do so before the Court's final Conference so that the matter would be resolved before the summer recess. But Respondent proceeded to move to withdraw his federal claims without prejudice, a maneuver that would have permitted Respondent to refile the same claims one day after this Court removed the Petition from its docket. The district court

understandably denied that motion. Respondent subsequently moved to dismiss with prejudice and that motion was granted. But as a result, this Court has been inconvenienced by the fact that the case remains on its docket and Petitioners have suffered the uncertainty of not knowing whether they remain bound by the adverse judgment of the Fifth Circuit.

4. Petitioners therefore respectfully move the Court for an Order vacating the judgment below and awarding double costs.

Respectfully submitted,

*Of Counsel:*
Frank Massengale
Karen Kaler Whitfield
Poydras Center
650 Poydras St.
New Orleans, LA 70130-6101

Jonathan D. Schiller
*(Counsel of Record)*
Boies & Schiller, LLP 750
5301 Wisconsin Ave., NW
Suite 570
Washington, D.C. 20016
(202) 237-2727
*Counsel for Petitioners*

August 4, 1998

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

April 9, 1998

AREA CODE 202
479-3011

Jack E. Truitt, Esquire
3027 Ridgelake Drive
Metairie, LA 70002-4924

Re: 97-1507 - Teel, Karry, et al.
v. Khurana, Rajiv

Dear Mr. Truitt:

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Forty printed copies of your response, together with proof of service thereof, should be filed on or before May 11, 1998.

Your attention is directed to the provisions of Rule 33 of the rules of this Court. Please note that the color of the cover of your brief should be orange.

Sincerely,

William K. Suter
Clerk

cc: James A. Williams, Esquire
Jonathan David Schiller, Esquire

MINUTE ENTRY
McNAMARA, J.
JULY 15, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | | |
|---|---|---|
| RAJIV KHURANA | * | CIVIL ACTION |
| VERSUS | * | NO: 95-1217 C/W 98-0286 |
| INNOVATIVE HEALTH CARE SYSTEMS, INC., ET AL | * | SECTION: "D"(2) |

Before the court is the **"Motion to Dismiss with Prejudice and to Remand"** filed by Plaintiff, Rajiv Khurana. Defendants, Innovative Heath Care Systems, Inc., Kerry Teel, Carl Holden, William Malone, and IHS River Region Hospital of Vacherie, La., Inc., filed a memorandum in response. The motion was set for hearing on Wednesday, July 15, 1998.

Having considered the memoranda of counsel and the applicable law, and having heard oral argument from counsel, the court **GRANTS** the motion thereby dismissing Plaintiff's federal law claims asserted in this action, including Plaintiff's RICO claims, ***with prejudice***, and remanding to state court Plaintiff's state law claims asserted in this action.

However, the court **REFUSES** to include int his order (or any other order) the language propsoed by Plaintiff's counsel regarding the "[reservation of] . . . plaintiff's direct or derivative claims made in the sealed litigation bearing docket number 95-1088 "C" of this Honorable Court." Rather, the court makes **no** determination of how the court's dismissal of Plaintiff's federal law claims, including Plaintiff's RICO claims, asserted in this action **will or will not** affect claims asserted by Plaintiff in any other litigation.

* * * * * *

/signature/

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | | |
|---|---|---|
| RAJIV KHURANA | * | CIVIL ACTION |
| VERSUS | * | NO: 95-1217 C/W 98-0286 |
| INNOVATIVE HEALTH CARE SYSTEMS, INC., ET AL | * | SECTION: "D"(2) |

**JUDGMENT**

For the reasons set forth in this court's Minute Entry of July 15, 1998,

**IT IS ORDERED, ADJUDGED AND DECREED** that Plaintiff's federal law claims, including Plaintiff's RICO claims, be and are hereby dismissed ***with prejudice***;

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Plaintiff's remaining state law claims be and are hereby **REMANDED** to the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana,

New Orleans, Louisiana, this 15 day of July, 1998

/signature/
**UNITED STATES DISTRICT JUDGE**